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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 670

ASSOCIATION FOR THE PRESERVATION OF FREEDOM OF CHOICE, INC. and CHARLES P. MONG,
Petitioners,

versus

JAMES M. POWER, THOMAS MALLEE, DENNIS J. MAHON, and JOHN R. CREWS, constituting the New York City Board of Elections, ABRAHAM D. BEAME, GEORGE J. BALBACH, MICHAEL KOWIT, JAMES J. McFADDEN, J. RAYMOND JONES, ARLEIGH B. WILLIAMSON, EDWARD K. DUDLEY, PAUL T. O'KEEFE, ALICE SACHS, LLOYD E. DICKENS, MICHAEL BLOOM, ROSEMARY FAY, ANGELO SIMONETTI, FLORENCE M. FERGUSON, ANTONIO MENDEZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ALFRED AVINS
General Counsel, Association
for the Preservation of Freedom
of Choice, Inc.
6104 South Ellis Avenue
Chicago 37, Illinois
Attorney for Petitioners.

Of Counsel:
WILLIAM J. NEILAN,
Solicitor, APFC.
EDWARD P. SCHARFENBERGER,
STUART J. YOUNG,
Attorneys, APFC.

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JAMES M. POWER, THOMAS MALLEE, DENNIS J. MAHON, and JOHN R. CREWS, constituting the New York City Board of Elections, ABRAHAM D. BEAME, GEORGE J. BALBACH, MICHAEL KOWIT, JAMES J. McFADDEN, J. RAYMOND JONES, ARLEIGH B. WILLIAMSON, EDWARD K. DUDLEY, PAUL T. O'KEEFE, ALICE SACHS, LLOYD E. DICKENS, MICHAEL BLOOM, ROSEMARY FAY, ANGELO SIMONETTI, FLORENCE M. FERGUSON, ANTONIO MENDEZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners herein, by their attorney, the General Counsel to the Association for the Preservation of Freedom of Choice, Inc., pray that a writ of certiorari issue, to review the order of the New York Court of Appeals, entered in the above case on October 5, 1961.

OPINION BELOW

None of the courts below wrote any opinion. The orders of these courts are set forth in the appendix. The order of the Appellate Division is reported at 14 A.D. 2d 596 (No. 4) and the order of the Court of Appeals is reported at N.Y. 2d

JURISDICTION

The order of the New York Court of Appeals was made and entered October 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Does racial and religious discrimination in the selection of candidates for public office by public officials and by political committees which have been delegated state power by the state legislature violate the Fourteenth Amendment to the United States Constitution?

2. Are persons other than those of the Negro race protected by the equal protection and due process clauses of the Fourteenth Amendment, United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED.

Fourteenth Amendment, U. S. Constitution: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On August 9, 1961, petitioners, a non-profit membership corporation, and a registered Democratic voter residing in Manhattan, New York City, filed objections and specifications with respondent members of the New York City Board of Elections against the nominating petitions of respondents Beame, Dudley, and Dickens, candidates for the Democratic nomination for Comptroller of New York City and President of the Borough of Manhattan, respectively, charging that these candidates were designated on account of race, creed, and color, and that accordingly their designating petitions were void. Such objections were made pursuant to Section 145 of the New York Election Law. Upon the dismissal by respondent Board of Elections of the objections, the petitioners, on August 17, 1961, commenced a special proceeding in Supreme Court, New York County, to invalidate the petitions of the named candidates for the September 7, 1961 Democratic primary and to restrain their committees on vacancies, also named as respondents here, who it was alleged had participated in said racial discrimination, from further discrimination. The charged acts of discrimination were alleged to be in violation of the Fourteenth Amendment, as well as the New York State Constitution and Law Against Discrimination. In a second cause of action,

not here involved, review was sought of the order of the New York State Commission Against Discrimination, dismissing petitioner's complaint on the ground that the Commission lacked jurisdiction over public offices. The standing of petitioners to sue is not open to question, since it is customary in New York for a rival candidate to obtain a voter or other person to object rather than to object himself. See In re *Brook*, 169 Misc. 369, 6 N.Y.S. 2d 954 (1938); *Greenberg v. Cohen*, 173 Misc. 372, 17 N.Y. S. 2d 895 (1940), aff'd 258 App. Div. 1039, 17 N.Y.S. 2d 878; In re *Hornidge*, 205 Misc. 362, 129 N.Y.S. 2d 820 (1954), aff'd 283 App. Div. 805, 129 N.Y.S. 2d 498, aff'd 306 N.Y. 876, 119 N.E. 2d 45; *Mahoney v. Lawley*, 301 N.Y. 425, 94 N.E. 2d 587 (1950); Application of *Pabian*, 9 Misc. 2d 995, 998, 167 N.Y.S. 2d 250 (1957), aff'd 4 A.D. 2d 834, 166 N.Y.S. 2d 1023, aff'd 3 N.Y. 2d 888, 166 N.Y.S. 2d 761. (Cf. *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879), standing of taxpayers to sue.)

In a cryptic order, reprinted in the appendix, which did not even mention the first cause of action, the petition was dismissed without any trial by the Supreme Court. Because of this, the appendix reprints the allegations of the first cause of action. Under the New York practice, the allegations of a pleading which have been so dismissed must be taken as true. *Blanshard v. City of New York*, 262 N.Y. 5, 9, 186 N.E. 29 (1933); *Staten Island Edison Co. v. Maltbie*, 270 App. Div. 55, 58 N.Y.S. 2d 818, 820 (1945). The Appellate Division affirmed this order without opinion, and the Court of Appeals dismissed for want of a substantial constitutional question. In all courts, the federal question was carefully preserved, briefed, and argued.

REASONS FOR GRANTING THE WRIT

1. The New York Courts Below Have Decided Important Federal Questions Diametrically in Conflict With the Guiding Decisions of this Court.

If one principle of law can be said to be fixed in our constitutional firmament, it is that racial discrimination by government officials or persons exercising government power is forbidden. That such a prohibition extends to selection for public employment or office, paid from the public funds of all the taxpayers, is hardly open to doubt. *Slochower v. Board of Higher Ed.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *Alston v. School Board*, 112 F. 2d 992 (4th Cir. 1940); *Brooks v. Board of Education*, 267 F. 2d 733, 735 (8th Cir., 1959). Several state cases have recognized this, including New York *People v. Crane*, 214 N.Y. 154, 161, 168, 108 N.E. 427 (1915) per Cardozo, C. J.; *Terry v. Civil Service Comm.*, 108 Cal. App. 2d 861, 240 P. 2d 691, 697 (1952); *Morgan v. Civil Service Comm.*, 131 N.J.L. 410, 36 A. 2d 898, 901 (1944); *Opinion of Justices*, 302 Mass. 631, 22 N.E. 2d 49, 58 (1939).

Notwithstanding the fact that the petition herein specifically alleged that such racial and religious discrimination was engaged in by Mayor Robert F. Wagner of New York City and other city officials, and was engaged in by the Democratic County Committee, a body set up and functioning under state law, and which exercised state power, the petition was dismissed without even a hearing or trial on the allegations thereof.

In addition, this Court has been adamant in its adherence to the principle that "no election machinery could be sustained if its purpose or effect" was to deny persons "on account of their race an effective" voice or chance to be considered for office "in the governmental affairs of their county, state, or community." *Terry v. Adams*, 345 U.S. 461, 466 (1953). Moreover, "the constitutional right to be free from racial discrimination . . . is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." *Id.*, at p. 466. Here, petitioners specifically alleged that the various Democratic party committees were set up pursuant to state law, performed functions recognized under and constituting an integral part of the electoral process of New York State's election machinery, and had engaged in racial discrimination. Notwithstanding these allegations which must be accepted as true, the New York courts held that such allegations stated no grounds for any relief.

Such holdings palpably fly in the face of this Court's most settled decisions. Far less than what is here present is needed to make a showing of state action. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). The mere fact that candidates of other parties can run in a general election does not insulate from review a primary; and the mere fact that other candidates can run in the primary does not insulate from review the pre-primary process which "functioned as a part of the state's electoral machinery." *Terry v. Adams*, supra, at p. 481. Nor does the argument that the question is "political" carry weight

when the state has engaged in racial discrimination. *Gomillion v. Lightfoot*, 364 U.S. 339, 346-7 (1961). It is clear that the failure of the New York courts to give any reason why the instant petition was legally insufficient cannot obscure their utter disregard of settled constitutional principles. Unless this Court is prepared to give free license to state courts to ignore the most settled principles of constitutional law by hiding their reasoning under an obscuring cloak of all-embracing silence, certiorari must be granted.

2. This Case Raises Issues of Vast Public Importance.

The fact that issues of racial discrimination are of public importance can hardly be denied, but the significance of such a claim is magnified many times where the choosing of public officials is involved. Government at all levels was never as important, never touched the lives of ordinary citizens, to the extent it does today. Never has it been of such transcendental importance that the most qualified governmental officials be chosen, without regard to race, creed, or color. Never has it been so necessary that the selection process for public officials be freed from the shackles of racial discrimination.

Ticket-balancing is, of necessity, racial discrimination. If another member of the ticket belongs to the same ethnic group as the aspirant, he is barred, regardless of his qualifications. Likewise, members of small minority groups are barred from any consideration. Surely, the right of every person to be considered for high public office based on his qualifications is as important as his

right to get a hamburger at a convenient restaurant. Cf. *Burton v. Wilmington Parking Authority*, supra.

Only this term this Court has heard our cities clamor for greater representation in legislative halls. Is this increased representation to consist of a larger number of political "hacks" chosen by the city bosses to appeal to ethnic minorities based on name or skin color without regard to fitness for the responsibilities of the offices they will hold? Is this where this Court's protection of Negro voting rights is to lead us — where it has already led in New York and other northern cities — as this case, all too unhappily, showed? Will this Court permit "the differences in cultural traditions, instead of adding flavor and variety to our common citizenry . . . [to] be hardened into hostilities by leave of law," as the squabbling community leaders of each ethnic minority demand that this office, or that office, or some other office, become its exclusive and vested property right in perpetuity, as the Negro community leaders in New York have already done in respect to the office of Borough President of Manhattan? (See enclosed circular attached to appendix.) *Hughes v. Superior Court*, 339 U. S. 464 (1950). Constitutional myopia in the extreme would be needed to consider the issue of racial and religious discrimination in our election process trivial.

Finally, a word should be said to quiet doubts about mootness since the September 7th Democratic primary has already been held and this case will not be decided until the general election is over. It might be noted that two of the candidates complained of here were nominated in the primary and elected. Under New York law, "none

of these respondents . . . has a right to be voted for by civilian electors unless his name is validly on the ballots in question." *King v. Cohen*, 293 N.Y. 435, 439, 57 N.E. 2d 748 (1944). And where the candidate or his agents, backers, or supporters, have engaged in fraud or other misconduct, his designation is void and he cannot be on the ballot due "to his own malfeasance." *Collins v. Heffernan*, 187 Misc. 165 63 N.Y.S. 2d 692, 694 (1946). Accord, Application of *Vukelic*, 200 N.Y.S. 2d 1018, 1020 (1960), and cases cited. Accordingly, where such a candidate has won the election, and protest was timely made, the New York Supreme Court can set aside the primary or general election and order a new election because of the illegality. *Lepori v. Zeissner*, 151 Misc. 423, 272 N.Y.S. 740 (1934). Hence, the New York Supreme Court would provide the same remedy in the event that illegal racial discrimination permeated the result. *Testa v. Katt*, 330 U.S. 386 (1947).

The above analysis is implicit in the holding of the Court of Appeals itself. In Matter of *Manning*, 139 N.Y. 446, 448, 34 N.E. 931 (1893), the Court of Appeals declared: "The practice of this court has been to refuse to entertain appeals when it is plain that nothing can be accomplished by the decision." Conformably with this, in every case where a challenge has been made to a nominating petition before the primary election, but by the time the case reached the Court of Appeals the primary has already been held, and no grounds are set forth to invalidate the election itself, the appeal has been dismissed, not on the merits, but for mootness. *Bednarsh v. Cohen*, 292 N.Y. 578, 54 N.E. 2d 693 (1944); *Savory v. Cohen*, 281 N.Y. 715, 23 N.E. 2d 542 (1939); *Nestler v. Cohen*, 265 N.Y. 576, 193 N.E. 327 (1934). Here, however, the pri-

mary was held on September 7, 1961, but the order of the Court of Appeals, issued on October 5, 1961, was grounded, not on mootness, but on the lack of a "substantial constitutional question." This is a determination on the merits, according to both the practice of the Court of Appeals (Cohen & Karger, Powers of the New York Court of Appeals 252-5 [1952]), and this Court. Compare *Matthews v. Hume*, 269 U.S. 262 (1952) with *Anonymous v. Baker*, 360 U.S. 287 (1959), affirming 4 N.Y. 2d 1034, 177 N.Y.S. 2d 687 (1958). Thus, the Court of Appeals has determined that the intervening election does not prevent effectual relief.

In addition, an order is requested requiring the several committees on vacancies to cease and desist from engaging in unlawful discrimination. This alone prevents any question of mootness from arising. *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334 (1944).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED AVINS
General Counsel, Association for the Preservation of Freedom of Choice, Inc.
6104 South Ellis Avenue
Chicago 37, Illinois
Attorney for Petitioners.

Of Counsel:
William J. Neilan,
Solicitor, APFC

Edward P. Scharfenberger,
Stuart J. Young,
Attorneys, APFC.

APPENDIX

COURT OF APPEALS OF THE STATE OF NEW YORK. October 5, 1961. N.Y. 2d . In the Matter of the Application of ASSOCIATION FOR THE PRESERVATION OF FREEDOM OF CHOICE, INC. et ano., Appellants, vs. JAMES M. POWER et al, Respondents.

Motion to dismiss the appeal granted and the appeal dismissed upon the ground that there is no substantial constitutional question directly involved.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, August 31, 1961. 14 A.D. 2d 596.

In the Matter of ASSOCIATION FOR THE PRESERVATION OF FREEDOM OF CHOICE, INC., et al, Appellants, v. JAMES M. POWER et al, Respondents. Order entered August 25, 1961, unanimously affirmed, with $20 costs and disbursements to respondents. Leave to appeal to the Court of Appeals denied. No opinion.

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM, PART I, NEW YORK COUNTY, Present: Hon. Morris E. Spector, Justice. No. 13570-1961.

In the Matter of the Application of ASSOCIATION FOR THE PRESERVATION OF FREEDOM OF CHOICE, INC., et al, Petitioners, v. JAMES M. POWER et al, Respondents.

Upon the foregoing papers this application to set aside a determination of the N.Y. State Commission Against Discrimination is denied. The Commission's finding of lack of jurisdiction in these elective offices is not unreasonable, arbitrary, or capricious.

Filed: August 25, 1961. M.E.S., J.S.C.

COMPLAINT

The petition of the Association for the Preservation of Freedom of Choice, Inc. (hereinafter called APFC) and Charles P. Mong respectfully shows:

FOR A FIRST CAUSE OF ACTION: PETITIONERS ALLEGE:

1. Petitioner A.P.F.C. is a non-profit District of Columbia membership corporation organized to promote the right to freedom of choice and association and to obtain public recognition for this right, and has as members electors and registered Democratic voters residing in the Borough of Manhattan who are not of the Negro race or of the Jewish faith, and who would be eligible for the Democratic nomination for the office of Borough Presi-

dent of Manhattan, or for the Democratic nomination for Comptroller of New York City, and who might have been designated to run for said offices but for the acts of discrimination hereinafter set forth, and who are eligible to vote in the Democratic primary on September 7, 1961.

2. Petitioner Mong is a registered Democratic elector residing at 175 East 89th St., Borough of Manhattan, New York City, eligible to vote in the Democratic primary on September 7, 1961, to choose the Democratic nominee for the offices of Borough President of Manhattan and Comptroller of New York City, and is not of the Negro race or Jewish faith, and might have been designated to run for said offices but for the acts of discrimination hereinafter set forth.

3. Petitioners bring this proceeding for themselves and all others of the same class who were likewise discriminated against.

4. On information and belief, on or about July 8, 1961, Mayor Robert F. Wagner of New York City announced his support of respondent Abraham D. Beame for the Democratic nomination for Comptroller of New York City and respondent Edward K. Dudley for the Democratic nomination for President of the Borough of Manhattan in the September 7, 1961 Democratic primary election to be held therein and designated them as the persons to be supported by his supporters, and based on said announcement, sundry other supporters of the Mayor for re-election, city officials, and so-called "reform" Democratic clubs, announced their choice of Beame for comptroller and Dudley for borough president, and have urged registered Democratic electors to sign petitions for Beame and Dudley and have obtained said signatures on petitions for Beame and Dudley, and have urged said voters to vote

for Beame and Dudley, all the above acts being motivated by the fact that Beame is of the Jewish faith and Dudley is of the Negro race, and by their desire to "balance" the Wagner ticket by obtaining a Jewish Democratic nominee for comptroller and a Negro Democratic nominee for borough president, and they did thereby commit acts of discrimination against persons of other faiths and races who might have otherwise been considered and chosen for said designations, in violation of the New York Law Against Discrimination, Executive Law, § 290 et seq., the New York State Constitution, Art. I, Sec. 11, and the United States Constitution, 14th Amendment; and they did also commit a fraud in obtaining signatures of registered Democratic voters by failing to inform them of the above illegality and discrimination, as aforesaid.

5. On information and belief, the Executive Committee of the Regular Democratic organization of New York County, popularly called "Tammany Hall", consists of all of the assembly district leaders and co-leaders elected to said posts pursuant to New York State Election Law, § 153, and is established pursuant to Election Law, § 10 and has been, by rule or custom and usage, delegated by the New York Democratic County Committee the function of selecting borough and county-wide candidates who will run as regular organization candidates in the Democratic primary election, and candidates selected by said Executive Committee are by long custom and usage given consents to run on the regular organization line with other regular organization candidates for city-wide and local nominations.

6. On information and belief, the aforesaid borough-wide candidates designated by the Executive Committee are in the majority of cases unopposed in the Democratic

primary election, and when so opposed are almost alway successful, and said designation is usually abided by mos regular Democratic clubs, and the members thereof, in cluding the county committeemen, as a direct result o said designation, obtain signatures for said candidates o primary designating petitions necessary to be on the pr mary ballot, and urge voters to vote for them, and as result of the fact that New York County normally elect Democratic Party candidates, in an overwhelming ma jority of cases said designation by the Executive Com mittee is the equivalent of election to office.

7. On information and belief, the process by which th Executive Committee designates Democratic nominees an integral part of the process of electing public official in New York County, and Borough of Manhattan, and i so designating officials the said Executive Committe members exercise power delegated by New York State.

8. On information and belief, during July, 1961, th Regular Democratic organization of New York County represented by its Executive Committee, did announc their choice of respondent Lloyd E. Dickens as their des ignee for the Democratic nomination for Borough Pres dent of Manhattan, and based on said choice they and thei club members have urged registered Democratic electo to sign petitions for Dickens, and have urged said voter to vote for Dickens, and have obtained said signatures o petitions for Dickens, all of the above acts being motivate by the fact that Dickens is of the Negro race and by thei desire to "balance" the regular organization ticket an obtain a Negro Democratic nominee for Borough Pres dent, to obtain the support of Negro Democratic leader and of Negro voters for said regular organization ticke and they did thereby commit acts of discrimination agains

persons of other races who might otherwise have been considered for and chosen for said designation, in violation of the New York State Law Against Discrimination, Executive Law, § 290 et seq., the New York State Constitution, Art. I, Sec. 11, and the United States Constitution, 14th Amendment, and they did also commit a fraud in obtaining signatures of registered Democratic voters by failing to inform them of the above illegality or discrimination, as aforesaid.

9. On information and belief, respondents Balbach, Kowit, McFadden, Jones, and Williamson constitute the committee to fill vacancies of respondent Beame for comptroller; respondents O'Keefe, Jones, and Sachs constitute the committee to fill vacancies of respondent Dudley for borough president of Manhattan; and respondents Bloom, Fay, Simonetti, Ferguson, and Mendez constitute the committee to fill vacancies of respondent Dickens for borough president of Manhattan, and each of said members of said committees has participated in the aforesaid discrimination.

WHEREFORE, petitioners pray that an order be entered annulling the petitions and designations of respondents Beame, Dudley, and Dickens, and requiring the Board of Elections to do likewise, and requiring respondent members of committees on vacancies to cease and desist from engaging in unlawful discrimination.

Association for the Preservation of Freedom of Choice, Inc.

DIVISION OF ADMINISTRATION

SPECIAL COMMITTEE FOR EQUAL RIGHTS TO PUBLIC OFFICE

1497 Lexington Avenue

New York 28, New York

LE 4-9085

Dear Voter:

Do you believe in discrimination in reverse? Do you believe that any one ethnic or racial group in Manhattan should have a monopoly to any public office? Do you think that any minority group in any political party should be able to dictate the perpetual nominating of one of its members to public office?

Since early this spring, the Association for the Preservation of Freedom of Choice, Inc., has been fighting the concept that any public office should be the private preserve of any one minority in the City of New York. Long before the present primary campaign commenced, on March 13, 1961, a few weeks after the present Borough President of Manhattan was chosen, the A.P.F.C. filed a complaint with the New York State Commission Against Discrimination charging that "Mayor Robert F. Wagner, in fear of the political consequences of choosing someone other than a member of the Negro race as President of the Borough of Manhattan, to replace the prior incumbent, determined at the time of the conviction of Hulan Jack, and thereafter, that he would support only a member of the Negro race for such office," and that the Mayor supported and secured the election of Borough President Dudley for this reason.

More recently, as you will see in the enclosed circular, the A.P.F.C. has commenced a federal court suit to prevent further discrimination in selecting the Borough President. Of course, what the Mayor should not be permitted to do, political leaders in Harlem should not be permitted to do.

The A.P.F.C. has no connection with any other organization or committee in Manhattan. For two years it has been the only corporation in New York State organized to "promote the right to individual freedom of choice." The A.P.F.C. has recently won a major case in the New York Court of Appeals, New York's highest court, giving it the right to promote freedom of choice in New York.

To promote freedom of choice and equal rights in respect to elections to public office, the A.P.F.C. has recently formed a special committee. We ask you to open the page to see how your freedom of choice is being restricted, and what you can do about it.

Very truly yours,

Alfred Avins

For the Committee

P.S. The SEPTEMBER 7th PRIMARY is just around the corner. Help us to get out the vote on September 7th. DON'T LOSE YOUR FREEDOM OF CHOICE.

THE PROBLEM: DISCRIMINATION IN REVERSE:

No Whites Allowed

John Young, an independent candidate from Harlem for the Democratic Borough Presidential nomination, charged the Republican party had turned the clock back "by picking a white female candidate with a marked southern accent." The Republican designee is Doro

Choosing a Borough President

To the Editor of The New York Times:

The thought may be naive, but it would seem that Manhattan's Borough President need not be a Negro.

Some of us still have the notion that the city's Councilmen—our representatives in the matter—should select the man best qualified. Jim Crow has a reverse side.

ERNEST M. SELIGMANN

Brooklyn, Jan. 7, 1961.

backed Lloyd E. Dickens against Mayor Wagner entry, Edward R. Dudley. Mr. Dudley, receiving the apostolic blessing of Rev. Adam Clayton Powell Jr., won in a photo finish.

Messrs. Jack, Brown, Dickens and Dudley are all, of course, Negroes, there being a strict clause in the New York City Charter providing that the Borough President of Manhattan must, whatever else he is, be black. They say the ACLU is preparing a complaint to the Federal Civil Rights Commission on the ground that this clause discriminates unfairly against Jews and Puerto Ricans

Mrs. Borough President

No 'Right' of Succession

There seems to be an effort in some quarters to establish the idea that if and when the office of Borough President of Manhattan becomes vacant it shall be filled with a Negro. Such thinking apparently assumes that since Hulen E. Jack, who has suspended himself while awaiting trial, is a Negro, and the first to hold that office, a sort of claim for all time has been created.

Thus by right of inheritance, by automatic succession, an office once won would always go to the race, color or religion that managed it. This is a principle utterly offensive to democracy; if it had been in effect, to get a hold on it. To argue that an inherited right exists to an office would mean that no Roman Catholic could ever be elected to an office previously held by a Protestant or a Jew, or that no Negro could ever be named to Congress from a seat previously held by a white.

Whenever there is discrimination favoring one race, religion or color, there exists simultaneously and automatically discrimination against some other race, religion or color. Nothing that Mr. Jack has done constitutes a reason why a Negro should not be considered for his or any other office. The color of a man's skin should not be a qualification or disqualification for office. That is the meaning of equal

Lie... crats, ... by a plural... gest margin ever... Mayoralty history. Mr. Wagner has had a ... second term. A series of ... scandals within his administration has come to light. Critics have complained that the Mayor has ... exert leadership. Since ... ization problems ... cated by a Demo... reform factio... many leader a ... nitteman Carl ... state chair... ergast on char... time the Ma... loof from th... result that ... him. Then ... made plain ... actively under consideration for ... the Borough Presidency, he is ... a Negro.

Originally, the Mayor had ... the support of Councilman ... Brown, Louis Okin and Samuel ... Davis for "an outstanding ind... pendent candidacy."

It was understood the Mayor ... favored Robert L. Weaver for ...

Continued on Page 19, Column 6

But the team, in endorsing Mr. Brown, named Mr. Dickens as second choice. Mr. Dickens, a member of the team, is the leader in the Eleventh Assembly District.

Makes No Claim

The Mayor does not support Mr. Dickens. But it was noted with interest that Mr. Wagner made no claim in his statement that he had the votes to put across Justice Dudley.

The 50-year-old Justice, appointed by the Mayor, is a former United States Minister to Liberia. Like all the others ... Borough Presidency, he is a Negro.

... the support of Councilman ... Brown, Louis Okin and Samuel ... Davis for "an outstanding ind... pendent candidacy."

... It was understood the Mayor ... favored Robert L. Weaver for ...

... Tuesday ... victory. ... Manhattan, replacing Hulan ... who had been convicted of viola... conflict of interest laws. In ... election there was general ... agreement among Democrats only ... on the point that the new Borough ... President should be, like Mr. Jack ... a Negro.

... Justice Edward R. Dudley. Both ... are Negroes. ... the anti-De Sapio group of ... atic district leaders with ... Wagner has been ... reported declin... preference

Ordeal by Logic

The Association for the Preservation of Freedom of Choice (Inc.), continues its campaign against rampant New York ideologization in the matter of race relations. The Association seeks to point out the internal inconsistencies and questionable constitutionalism of some of the so-called anti-discrimination laws. In March (see *NR*, April 22), the Association filed a complaint before the State Commission Against Discrimination (SCAD) charging that all white citizens of the Borough of Manhattan had been discriminated against when Mayor Wagner and four city councilmen chose Edward R. Dudley as Borough President to succeed Hulan Jack after having first considered and, for one reason or another, rejected Robert C. Weaver and Earl Brown—both of them, like Dudley and Jack, Negroes.

SCAD solemnly "investigated" the case and after hemming and hawing came up with a glorious evasion: since Dudley had filled an elective post he could not properly be classified as an "employee"—and hence the anti-discrimination clause, invoked by the Association for the Preservation of Freedom of Choice, was inapplicable. And never mind that Dudley had not in fact been elected to the Borough Presidency but selected to fill the job by five men who had looked for their candidate only among the Negro community.

APFC promptly appealed the SCAD decision to the Supreme Court of the State of New York, New York County, and had the rare good luck of pleading before Judge Henry Epstein, a Stalk[illegible]ite of Liberalism who not long ago [illegible]DOING[illegible]amco was

Reg. U.S. Pat. Off. VOL. 128—NO. 24[illegible] and at additional mailing offices

Latest News

Mayor Robert F. Wagner and four city councilmen were charged with racial discrimination today in the choice of Edward R. Dudley, a Negro, as Manhattan Borough President. They were named in a civil suit filed in Federal Court by the Assn. for the Preservation of Freedom of Choice Inc., and Charles P. Mong, a Manhattan Democrat.

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Charles [illegible]

and trial Riss

Mayor Charged With Bias in Naming Negro

Mayor Wagner and four members of the City Council were named as defendants yesterday in a civil suit that charges pro-Negro bias in the selection of Edward R. Dudley as Manhattan Borough President.

The suit was brought in United States District Court by a little-known group called the Association for the Preservation of Freedom of Choice, Inc. It alleges Mr. Wagner and the councilmen, in making the interim selection, restricted the field of candidates to Negroes. Thus non-Negroes were deprived of their rights, according to the suit.

The four councilmen are Earl Brown, who is a Negro, Daniel S. Weiss, and Louis Okin, all Democrats, and Stanley M. Isaacs, R., Lib.

Mayor Named in Bias Suit

A Federal court suit was filed today against Mayor Wagner and four Councilmen charging racial discrimination in the choice of Edward K. Dudley for Manhattan Borough President. The civil suit was filed by the Association for the Prevention of Freedom of Choice, Inc., and P. Mong, a Manhattan Democrat.

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GROUP SUES WAGNER ON CHOICE OF DUDLEY

Equal Rights for Office

A suit has been filed in Federal Court to void the election of Edward R. Dudley as Borough

WHAT YOU CAN DO ABOUT DISCRIMINATION, IN THE SEPTEMBER 7th PRIMARY:

Unquestionably, the best qualified candidate for Borough President of Manhattan, a man who was not selected on a discriminatory basis but because of his qualifications, is Congressman Alfred E. Santangelo. Congressman Santangelo has the following record:

1957 to Date: Congressman, 18th District of Manhattan. Member of the House Appropriations Committee and District of Columbia Subcommittee, supervising the $300 million budget for traffic, schools, police, capital outlay, and other District of Columbia government municipal activities.

1947-1956: State Senator, State of New York. Member of the Building Code Commission, Temporary Commission on Youth and Juvenile Delinquency, Permanent Joint Committee on Labor and Industrial Conditions, and City Affairs Committee.

1945: Assistant District Attorney, New York County.

In announcing his candidacy, Congressman Santangelo said:

"I am not an appeaser. I will not permit any minority group to dictate to the Democratic Party under threat of bolting to the opposition."

The Association for the Preservation of Freedom of Choice, Inc., endorses the above statement. The A.P.F.C. urges you to vote for candidates best qualified regardless of ethnic or racial group; it urges you to vote for CONGRESSMAN ALFRED E. SANTANGELO for Borough President of Manhattan.

ASSOCIATION FOR THE PRESERVATION
OF FREEDOM OF CHOICE, INC.,
Special Committee for Equal
Rights to Public Office
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New York 28, New York

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IN THE

Supreme Court of the United States

October Term, 1961

No. 670

ASSOCIATION FOR THE PRESERVATION OF FREEDOM OF CHOICE, INC. and CHARLES P. MONG,

Petitioners,

versus

JAMES M. POWER, THOMAS MACLEE, DENNIS J. MAHON; and JOHN R. CREWS, constituting the New York City Board of Elections, ABRAHAM D. BEAME, GEORGE J. BALBACH, MICHAEL KOWIT, JAMES J. McFADDEN, J. RAYMOND JONES, ARLEIGH B. WILLIAMSON, EDWARD K. DUDLEY, PAUL T. O'KEEFE ALICE SACHS, LLOYD E. DICKENS, MICHAEL BLOOM, ROSE MARY FAY, ANGELO SIMONETTI, FLORENCE M. FERGUSON, ANTONIO MENDEZ,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION FOR RESPONDENTS CONSTITUTING THE NEW YORK CITY BOARD OF ELECTIONS

LEO A. LARKIN,
Attorney for Respondents Constituting the New York City Board of Elections,
Municipal Building,
New York 7, New York.

SEYMOUR B. QUEL,
ALFRED WEINSTEIN,
of Counsel.

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Jurisdiction

The order of the New York Court of Appeals was entered on October 5, 1961. On December 11, 1961, respondents received by mail copies of the instant petition, but they have not yet received the notice required by Rule 21 (2). The United States Law Week, issue of January 23, 1962, indicates that filing was not completed until January 17, 1962. This would seem to be too late under Rule 22 (3) and 28 USC 2101 (c).

Question Presented

If this proceeding has not been rendered moot by events which occurred after its commencement, the question it presents may be stated as follows:

Where political party enrollment is equally available to all voters, and all those enrolled may participate equally in the choice of nominees, is the Equal Protection clause violated when the election system permits any voter to base his choice upon discriminatory motives?

Messrs. Jack, Brown, Dickens and Dudley are all, of course, Negroes, there being a strict clause in the New York City Charter providing that the Borough President of Manhattan must, whatever else he is, be black. They say the ACLU is preparing a complaint to the Federal Civil Rights Commission on the ground that this clause discriminates unfairly against Jews and Puerto Ricans.

Mrs. Borough President

In a day of revolt against precedent, a revolt as reckless as it is surprising, the New York County Republican organization has designated not only a woman as its candidate for Borough President of Manhattan, but also a woman who happens to be white and furthermore is a Protestant. She is Mrs. Lawrence, now serving her second term in the Assembly from a district on the upper East Side. She came to New York nearly thirty years ago, and has been a Republican leader of the Eighth Assembly District since 1943, doing a STANDARD

CITES DUAL STANDARD

Manhattan: Liberals have strange views. Apparently, segregation is bad in the South, but proper in Manhattan where only a Negro can be Borough President.

C. C. ...olitical office, ...ere coming to New ...

The Manhattan Republicans apparently feel that once an office, such as the Borough Presidency, is occupied by a Negro there is no irrevocable mandate that it continue so by right of inherited succession in perpetuity. In designating a white Protestant, when the prevailing political custom in ticket-balancing by all parties is to confine the field almost wholly to Irish Catholics, Italian Catholics and Jews, they really threw away the clubhouse rule book. It is a daring innovation. We believe the voters, whether they elect Mrs. Lawrence or not, are ahead of the political leaders in their willingness to look for competence first, and disregard religion, race, color and even sex as irrelevant and immaterial.

by a Pro... could ever be named ... previously held by a white.

Whenever there is discrimination favoring one race, religion or color, there exists simultaneously and automatically discrimination against some other race, religion or color. Nothing that Mr. Jack has done constitutes a reason why a Negro should not be considered for his or any other office. The color of a man's skin should not be a qualification or disqualification for public office. That is, the meaning of equal opportunity.

ORK TIMES,

Dickens Said to Be in Lead For Borough Presidency

By LEO EGAN

Assemblyman Lloyd Everett Dickens of Harlem took a big lead last night in the race for the unexpired term of Hulan E. Jack for Borough President of Manhattan. The post will be filled today at a meeting of Manhattan's six own City Councilmen with Mayor ce... Vagner at City Hall.

The selection of Mr. Dickens would represent a major political setback for Mayor Wagner and his campaign to oust Carmine G. De Sapio as the New York County Democratic leader. If chosen, Mr. Dickens would owe his election to help he received from Mr. De Sapio. The Tammany leader is reported to have persuaded two of the four Democratic Councilmen to vote for him.

By backing a candidate acceptable to Negro district leaders in Harlem, Mr. De Sapio appeared to be strengthening his own position as county leader.

The Harlem group represents three of the sixteen votes in the county executive committee. If the anti-De Sapio faction were able to add these votes four, it would have al... to unseat the ...

rk Time...

5 in Harlem Pre... Attempt to Choo... Jack's Successo...

By PETER KIHSS

Harlem's five Negro Democratic district leaders met again last night in an attempt to agree on a candidate for Borough President of Manhattan.

CKENS IN LEAD TO REPLACE JACK

Dickens Leads in Race for Jack's Post, Page 1, Col. 3

Justice Edward R. Dudley. Both are Negroes.

The anti-De Sapio group, of Democratic district leaders with whom Mr. Wagner has been meeting, were reported declining to express any preference for Borough President.

Their attitude indicated they would oppose, in this year's Democratic primary, the nomination of whoever is c... Manhattan Cou... succeed Mr. Jack.

Bo... ocratic... said, he ... of an "o... Democrat ... post, left v... cing of Hul... flict-of-inter...

Former En...

Before being ... bench by Mayor ... Mr. Dudley ser... States Minister t... executive assistant ... ernor of the Virgin...

Like Mr. Jack, bot... ley and Assemblyman ... Dickens, the only oth... date who figured in the ... ing, are Negroes resi... Harlem.

both ... Adam ... sentative ... for renominat... when Mr. De Sap... Jr. for renomination ... when Mr. De Sapio ... Councilman Brown to r... Democratic primary ...

Acceptable to Powell

Representative Powell liste... Mr. Dickens on Jan. 8 as o... of three candidates accepta... to him. The two others h... Civil Service Commis... George Gregory Jr. and ... Corrections Commissioner ... spoken ...

sion since Dudley had filled an elective post he could not properly be classified as an "employee"—and hence the anti-discrimination clause, invoked by the Association for the Preservation of Freedom of Choice, was inapplicable. And never mind that Dudley had not in fact been elected to the Borough Presidency but selected to fill the job by five men who had looked for their candidate only among the Negro community.

APFC promptly appealed the SCAD decision to the Supreme Court of the State of New York, New York County, and had the rare good luck of pleading before Judge Henry Epstein, a Stal[illegible]ite of Liberalism who not long ago [illegible]amco was guilty under New [illegible]ory practices in d[illegible]oyees to work [illegible] Arabia—which refuses [illegible]s. (Presumably Aramco should [illegible]n with bayonets.) Judge Epstein upheld the SCAD decision, but in the course of pleading, found himself arguing that while it is bad (and in New York State unlawful) for private enterprise to [illegible]n grounds of race, [illegible]olic officials to do so.

[illegible]ment of school boundaries and [illegible]in the transfer of pupils.

[illegible]in fact, if truth be [illegible]by the logical rout[illegible]—Mr. Alfred Avins [illegible]ave now taken their [illegible]hard-[illegible]ngs.

Bias Charged In Naming Dudley

A lawyer charged today that Mayor Robert F. Wagner had been in fear of the political consequences of choosing someone other than a Negro as president of the Borough of Manhattan, and that the Mayor induced Manhattan city councilman to select Edward R. Dudley, a Negro, for the job.

Alfred Avins, lawyer for the Assn. for the Preservation of Freedom of Choice, Inc., brought action in Supreme Court, charging the appointment was a violation of the state anti-discrimination law. Justice Henry Epstein took the matter under reservation.

and trial Riss

selection of Edward R. Dudley as Manhattan Borough President.

The suit was brought in Brown, who is a Negro, Daniel S. Weiss, and Louis Okin, all Democrats, and Stanley M. Isaacs, R., Lib.

Mayor Named in Bias Suit

A Federal court suit was filed today against Mayor Wagner and four Councilmen charging racial discrimination in the choice of Edward K. Dudley for Manhattan Borough President. The civil suit was filed by the Association for the Prevention of Freedom of Choice, Inc., and P. Mong, a Manhattan Democrat.

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GROUP SUES WAGNER ON CHOICE OF DUDLEY

The Association for the Preservation of Freedom of Choice, Inc., filed suit yesterday in Federal Court to void the selection of Edward R. Dudley as Borough President of Manhattan.

The suit accused Mayor Wagner and four City Councilmen of discrimination in the selection of Mr. Dudley, adding that at no time was any candidate other than a Negro considered to replace Hulan Jack, who forfeited his office upon conviction of accepting gratuities.

The other defendants named were Councilmen Daniel S. Weiss, Louis Okin, Earl Brown, and Stanley M. Isaacs.

Similar actions by the association before the New York State Commission Against Discrimination and state Supreme Court were dismissed.

In addition to the association, the action in Federal Court was also brought by Charles P. Mong, who indictated he would be eligible for the office of Borough President. Mr. Mong, who lives at 175 East Eighty-ninth Street, is a television repair man, according to the lawyers who filed the suit.

WHAT THE A.P.F.C. IS DOING ABOUT DISCRIMINATION:

Equal Rights for Office

A suit has been filed in Federal Court to void the election of Edward R. Dudley as Borough President of Manhattan. It accuses Mayor Wagner and four City Councilmen of discrimination, on the ground that at no time was any candidate other than a Negro considered to replace Hulan Jack, also a Negro.

It was pretty obvious, when a successor to Mr. Jack was being sought that no white man had a serious chance of getting the office. But this was only one instance of discrimination that is commonly and flagrantly evident, in both major political parties, in designating candidates. Every "balanced" ticket is a product of discrimination by contriving the distribution of public offices according to race and religion, rather than by an impartial appraisal of competence.

Does anyone assume for a moment that the Republican and Democratic tickets for city-wide office this year were completed without regard for race or religion? Was it accident that put a Jew, an Irish Catholic and an Italian Catholic in the top three places of the Republican ticket, and a German-Irish Catholic, a Jew and an Italian Catholic on the Democratic ticket? Is it happenstance that creates an exact balance of three faiths on the Board of Education and the Board of Higher Education? Is it chance that almost completely excludes white Protestants from judicial positions in some areas, in a discrimination *for* Catholics and Jews?

We hope and believe the ordinary voter is becoming disgusted with this disgraceful quota system, of something for everybody—well, almost everybody, some being more equal than others. Sooner or later it will be dropped by the political parties, in favor of nondiscriminatory search for merit and merit only. The sooner the better.

THE
e New York Times
ADOLPH S. OCHS, Publisher 1896-1935
EVERY DAY IN THE YEAR BY THE NEW YORK TIMES COMPAN

Legislation Involved

In addition to the Equal Protection clause there is involved the Election Law of the State of New York. It provides (McKinney's Consolidated Laws of New York, Book 17):

"2. Definitions

* * *

"5. The term 'nomination' means the selection in accordance with the provisions of this chapter of a candidate for an office authorized to be filled at an election at which official ballots are used.

"6. The term 'designation' means any method in accordance with the provisions of this chapter by which candidates for party nomination, or for election to party position, may be named for the purposes of any primary election.

* * *

"173 * * * the board shall deliver to him [a voter] an enrollment blank. * * * The voter * * * may make * * * a * * * mark * * * underneath the emblem of the party of his election; * * *

"186 * * * the names of the party designated by each voter * * * shall be entered by the board, opposite the name of such voter in the register * * *

"201 * * * A person shall not be allowed to vote the ballot of a party at a primary election * * * unless his enrollment with such party appears * * *

"114 * * * The designation of a candidate for party nomination at a primary election or for election to party position thereat shall be by petition * * *

"135. * * *

"2. Each sheet of such a petition, except as herein otherwise provided, shall be in substantially the following form:

"I, the undersigned, do hereby state that I am a duly enrolled voter of the party, and entitled to vote at the next primary election of such party, that my place of residence is truly stated opposite my signature hereto, and that I intend to support at the ensuing primary and I do hereby designate the following named person (or persons) as a candidate (or as candidates) for nomination of such party for public office (or public offices) or for election to party position (or party positions) of such party to be voted for at the primary election to be held on the day of , 19 , as hereinafter specified.

Names of candidates	Public office or party position	Place of residence (also post office address, if not identical)

"I do hereby appoint (here insert the names and addresses of at least three persons, all of whom shall be enrolled voters of said party) as a committee to fill vacancies in accordance with the provisions of the election law.

"In witness whereof, I have hereunto set my hand the day and year placed opposite my signature.

Date	Name of signer	Residence	Ward (except in the city of New York)	Election district	Town of city (except in the city of New York)	Assembly district (only in the city of New York or in the town of Hempstead)

State of New York }
County of } ss.:

"On the dates above indicated, before me personally came each of the voters whose signatures appear on the petition sheet, to me personally known, who, being by me duly sworn, each for himself, said that the foregoing statement made and subscribed by him was true.

"(Signature and official title of the officer authorized to take affidavits.)

"3. In lieu of such authentication there may be appended at the bottom of each sheet, a signed statement of a witness, who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a resident of the same political unit in which the

office or position is to be voted for, (however, in the case of a petition for election to the party position of member of the county committee, residence in the same assembly district shall be sufficient) as to the subscription thereof. Such statement shall be accepted for all purposes as the equivalent of an affidavit, and if false shall subject the witness to the same penalties as if he had been duly sworn. The form of such statement shall be substantially as follows:

STATEMENT OF WITNESS

"I, (Name of witness) state: I am a duly qualified voter of the state of New York; an enrolled voter of the party and now reside in the (fill in number) election district of the (fill in Assembly district, if in New York City, ward in any other city, or town, if outside city) in the city, town or village of , in the county of , in such state, at (fill in street and house number and postoffice) therein. I was last registered for the general election in the year from (fill in street and house number and postoffice) in the (fill in city, town or village) in the county of , in such state. The said residence was then in the (fill in number) election district of the (fill in Assembly district, if in New York City, ward in any other city, or town, if outside city). I know each of the voters whose names are subscribed to this petition sheet containing (fill in number) signatures and each of them subscribed the same in my presence and upon so subscribing declared to me that the foregoing statement, made and subscribed by him, was true.

Signature of witness.

Date.

"§136 * * *

2. A petition must be signed * * * by not less than five percentum * * * of the enrolled voters of the party residing within the political unit * * * provided * * * that for the following public offices the number of signatures need not exceed the following limits:

(a) for any office to be filled by all the voters of the City of New York, five thousand signatures;

(b) for any office to be filled by all the voters of any county or borough within the City of New York, two thousand five hundred signatures; * * *

* * *

"§270 * * * The candidate receiving the highest number of votes for nomination for a public office * * * shall be the nominee of his party for such office * * * * "

Statement

Petitioner Mong is an enrolled Democrat who was eligible to vote in the September 1961 primary election of the Democratic nominees for candidacy for the New York City offices of Comptroller and President of the Borough of Manhattan. He "might have been designated to run for said offices" but for the discrimination of which complaint is made. Mong is neither a Negro nor a Jew (2).*

It is not clear in what sense petitioners use the term "designated" in the several paragraphs of their pleading.

* Unless otherwise indicated, numerals in parentheses refer to paragraphs of the petition with which this proceeding was initiated in the Supreme Court of New York. References to the petition for certiorari are herein made to its page numbers as follows: "(Pet. p.)".

They may intend it to mean "nominated", as the first and second paragraphs of the petition might indicate. They may intend it to have the statutory meaning imparted by the Election Law. Or they may intend that it convey the sense of having been announced as the person whom someone will support in an effort to achieve the required designations (in the statutory sense) and nomination thereafter. This last meaning is indicated by the use of the term in paragraphs 4-8, inclusive.

Only an individual enrolled voter can make a designation, in the statutory sense, of the kind here involved. Election Law, §135. If enough designations of someone are obtained, the designee's name will appear on the primary ballot. Election Law, §136. Nomination is achieved by attainment of a plurality in the primary election. Election Law, §270.

Last July, one Robert F. Wagner, a Democrat who was Mayor of New York City, announced his support of respondents Beame and Dudley, respectively, a Jew and a Negro, for nomination to the offices, respectively, of Comptroller of New York City and Borough President of Manhattan, and he "designated" them as persons to be supported by his supporters. Based on this announcement, supporters of the Mayor for re-election, including office holders and organized groups, announced their similar support, urged enrolled Democrats to sign petitions for such respondents [i.e., to "designate" them, in the statutory sense] and to vote for them, and they obtained signatures. All such activity was motivated by the desire to have the "Wagner ticket" put in "balance" by placing thereon a Jew and a Negro (4).

An executive committee of the regular Democratic organization in New York County (Borough of Manhattan), popularly called Tammany Hall, which committee consists of persons elected by enrolled Democrats, has, by rule or usage, been "selecting" persons to be primary candidates for borough positions. The selectees usually "run on the regular organization line with other regular organization candidates" for nominations (5). Such persons are usually supported by regular party workers, and in consequence thereof such persons usually obtain enough designations to place them on the primary ballot and enough support in the primary to obtain the nomination. The electorate of the Borough of Manhattan usually elects Democratic candidates (6).

In July 1961 the members of the Tammany committee announced the choice of respondent Dickens, a Negro, as "designee" for the nomination for Borough President. Based on such choice, sundry politically active Democrats urged enrolled Democrats to sign petitions for Dickens, obtained signatures, and urged his nomination. All of the foregoing acts were motivated by the desire to "balance" the "regular organization ticket" and to obtain the support of politicians and voters who were Negroes (8).

It is alleged that the process by which the executive committee "designates Democratic nominees" is "an integral part of the process of electing public officials in New York County, and Borough of Manhattan, and in so designating officials, the said executive committee members exercise power delegated by New York State" (7).

Petitioners filed objections based on the above grounds with respondent Election Board members. The Board was either going to reject the objections or fail to take timely action thereon (10).

The instant petition, at page 8, refers to a circular attached to the appendix. It is apparent from the last unnumbered page thereof that for the office of Borough President, a third person, in addition to respondents Dudley and Dickens, received enough designations to run in the Democratic primary. It is also apparent that such third person was designated on a non-discriminatory basis satisfactory to petitioners.

POINT I

Since the general election, as well as the primary, has been held, this proceeding is moot.

The primary election has been held, and the general election too, as is virtually admitted (Pet., p. 8) and as this Court may judicially notice. Accordingly, this proceeding, addressed to the primary designations, is moot. *Mills v. Green*, 159 U. S. 651 (1895). *Cook v. Portson*, 329 U. S. 675 (1946); *cf. Giles v. Harris*, 189 U. S. 475 (1903).

We do not, here, argue that petitioners' grievance does not survive, but subsequent events raise issues, regarding the validity of the elections, which are not within the scope of this proceeding. It may be that the designees were nevertheless properly placed on the primary ticket because they were designated by a sufficient number of voters, who were not motivated by considerations of a ticket balanced

on racial or religious bases. Also, the general election involved the whole Democratic ticket, and others than respondents here are concerned. *Cf. Mills* v. *Green*, 159 U. S. 651, 656-657 (1895).

Moreover, jurisdiction of the Supreme Court of New York is limited in election cases. There is doubt that a general election may be annulled in a proceeding such as this. *Cf. Matter of McGuiness* v. *DeSapio*, 9 A D 2d 65, at 73, and cases there cited (1st Dept., 1959) lv. app. den., 7 N Y 2d 708; *Reich* v. *Bosco*, 21 Misc 2d 973, at 979, and cases there cited, aff'd 9 A D 2d 919 (2d Dept., 1959), even if it be assumed that there is any New York judicial power in any case to accomplish a disfranchisement by the annulment of a general election. See *Matter of Creedon*, 264 N. Y. 40, 43 (1934). At least, there may be matters involving judicial discretion, for the indications are that such annulment would be most gravely regarded. See *People ex rel. Hirsch* v. *Wood*, 148 N. Y. 142, 146-147 (1895).

The New York Court of Appeals has not indicated an attitude inconsistent with our position here or with its earlier expressed positions regarding moot appeals in election cases. See *Matter of Madden*, 148 N. Y. 136, at 139 (1895). Petitioners here had sought leave to appeal to that Court. Their motion was denied (10 N Y 2d 705), not dismissed, on the same day that Court dismissed the appeal they had taken as of right on constitutional grounds under N. Y. Civil Practice Act, 588, subd. 1 (a). That Court's dispositions of the matter indicate its position that the constitutional question was not only not "substantial", but also that it was not "directly" involved. The latter po-

sition may well be attributable to the awareness that, the primary elections having been held, there were other issues affecting its validity or that there were procedural obstacles to its annulment in this proceeding. In any event, the Court of Appeals made its decision before the general election was held.

POINT II

Equal participation in party activity being assured to all, there is no denial of equal protection.

This is not a situation such as those involved in *Terry v. Adams*, 345 U. S. 461 (1953), and its predecessor cases, where discrimination was a built-in feature of the electoral process. In those cases party organization was a mechanism of exclusion, with membership limited to white people or with Negroes excluded from the primaries.

In New York any voter may enroll as a Democrat (or as a member of any other party). Any enrolled voter may sign a designating petition, and he may later vote in the primary. There is no restriction at any stage which does not apply to all. We do not think that because the State prescribes the machinery of designation and nomination, a voter's choice of whom he will support is State action, so long as that choice is unfettered by any unequal condition imposed or sanctioned by the State.

But even if such a choice were, somehow, to be deemed State action, no discrimination is involved where individual choice is not dictated, and the number of persons who may make one and express it by political action is not limited

by any condition which does not apply to all. Stated somewhat differently, there was nothing to prevent Mong himself from obtaining the designations required for a place on the primary ballot and the plurality of votes to make him the nominee.

Paragraph 7 of the petition is a conclusion of law, and it is inaccurate. Not committees but only individuals can make designations of the kind here involved, as the Election Law provides. See *Theofel v. Butler*, 134 Misc. 259, 264 (1929); *Matter of Kooperstein v. Power*, 153 N. Y. Supp. (2d) 908, at 910 (1956, no official citation), aff'd 2 A D 2d 655, aff'd 1 N Y 2d 868. Assuming the conclusion were correct, it would be immaterial. There is no unequal restriction upon voters who choose committee members or limitation upon the choice made by the latter.

CONCLUSION

The petition should be denied.

January 25, 1962.

Respectfully submitted,

LEO A. LARKIN,
Attorney for Respondents Constituting the New York City Board of Elections.

SEYMOUR B. QUEL,
ALFRED WEINSTEIN,
Of Counsel.